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January 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: June 14, 2004

Case No.: TIA-0112

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The Applicant's late husband (the Worker) was a DOE contractor employee at a DOE facility. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. ' ' 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. ' 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that

¹ www.eh.doe.gov/advocacy

was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. ' 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed at the DOE's Savannah River site. He worked at the site, primarily as a heavy water operator, for nearly 27 years, from 1952 to 1979.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses - heart disease and chronic obstructive pulmonary disease (COPD). The Applicant asserted that the Worker's illnesses were the result of exposure to hazardous chemicals in the course of his employment. The Physician Panel rendered a negative determination on each of these illnesses. The Panel found that there was insufficient evidence establishing a link between the Applicant's heart disease and his workplace exposures. The Panel noted that the Worker had a number of non-occupational cardiac risk factors, including hypertension, heavy smoking, and heavy alcohol usage. The panel further determined that there was insufficient evidence of workplace exposures that could have contributed to the Worker's COPD. The Panel noted the non-occupational factors listed above as possible aggravating factors of the COPD.

The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that

illness was related to a toxic exposure at the DOE site, and state the basis for that finding.²

The Applicant argues that the Physician Panel erred in determining that the Worker's illnesses were not related to his workplace exposures. First, the Applicant points out errors in the Panel report. Second, the Applicant also provides a DOL Notice of Final Decision which states that, since the Worker had an occupational history of beryllium exposure and the Worker's medical records satisfied three of the five criteria necessary to establish chronic beryllium disease (CBD), the evidence establishes that the Worker had CBD.

First, with regard to the errors in the panel report, the Applicant's arguments do not provide a basis for granting the appeal. In her appeal, the Applicant states that there was an error regarding the Worker's name, position of employment, and alcohol use. The Panel considered the entire record in making its determination. The record accurately states the Worker's name and position of employment. Consequently, the errors Applicant refers to do not indicate an error in the Panel's analysis. The Applicant also maintains that the Panel overstated the Worker's alcohol use. The record includes substantial evidence documenting the Worker's alcohol use. Furthermore, the Panel report includes a discussion of exposures. The discussion makes clear that the Panel viewed the exposures as insignificant. Accordingly, even if the Panel overstated the Worker's alcohol use, any such overstatement would not have affected the decision.

Second, the DOL award letter stating that the Worker had CBD does not indicate panel error. CBD was not a claimed illness. Therefore, the Panel's failure to consider CBD was not error. If the Applicant wishes to claim CBD as an additional illness, she should contact the DOL in order to request information on how to proceed with her claim. Under Subpart E, the DOL award for CBD under Subpart B will result in a positive Subpart E award.

As the foregoing indicates, the Applicant's claim does not provide a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0112 be, and hereby is, denied.

² 10 C.F.R. § 852.12.

- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 11, 2005